Supreme Court, U. S.
FILED
FEB 28 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1068

FREDERICK B. PFISTER,
Petitioner,
v.
THE HONORABLE JUDGE JOSEPH C. WADDY,
and
DELTA AIR LINES, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

---

MEMORANDUM FOR DELTA AIR LINES, INC., ET AL. IN OPPOSITION

PETER G. NASH, ESQ.
GEORGE J. PANTOS, ESQ.
ANNE E. MATTHEWS, ESQ.
VEDDER, PRICE, KAUFMAN,
KAMMHOLZ & DAY
1750 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 393-5970

Counsel for Respondents, Delta Air Lines, Inc., et al.

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1068

FREDERICK B. PFISTER,
Petitioner,

v.

THE HONORABLE JUDGE JOSEPH C. WADDY,

and

DELTA AIR LINES, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

---

MEMORANDUM FOR DELTA AIR LINES, INC., ET AL.[1] IN OPPOSITION

---

[1] This Memorandum in Opposition is submitted on behalf of the following Respondents herein (hereinafter collectively referred to as "Delta"): Delta Air Lines, Inc.; Delta Employee Benefit Plan, consisting of Delta Family Care, Disability and Survivorship Plan, Delta Air Lines, Inc. Group Insurance Plan, and Delta Family-Care Retirement Plan; Delta Admin-

Proceedings Below

The Petitioner herein, Frederick B. Pfister (hereinafter referred to as "Pfister") commenced his suit under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001, *et seq.* (1974) ("ERISA") on October 26, 1976 in the District Court for the District of Columbia. On December 20, 1976, the more than twenty defendants moved, pursuant to 28 U.S.C. § 1404(a) (1962), to transfer Pfister's case to the District Court for the Northern District of Georgia, Atlanta Division. On March 31, 1977, Judge Waddy of the District Court for the District of Columbia granted defendants' motion and ordered that the case be transferred to Atlanta. In reaching that decision, Judge Waddy expressly considered the following facts: Pfister had worked for Delta in Virginia, is currently unemployed, now resides in Pennsylvania, and is suing over twenty defendants who reside in or around Atlanta, Georgia. The Judge additionally noted that the records relevant to Pfister's lawsuit are located in Atlanta, that Delta's corporate headquarters are in Atlanta, that most of the individual

---

istrative Committee acting on behalf of Delta Family Care, Disability and Survivorship Plan, and Delta Family-Care Retirement Plan; W. T. Beebe, Individually; D. C. Garrett, Jr., Individually; R. Oppenlander, Individually; J. R. Howell, Individually; H. T. Fincher, Individually; R. W. Allen, Individually; R. S. Maurer, Individually; T. M. Miller, Individually; Wm. E. Stephens, Individually; Plan Administrator of Delta Family Care, Disability and Survivorship Plan, Delta Family-Care Retirement Plan, and Delta Employee Benefit Plan, Individually; John Aduddell; J. J. Schneider; and Donald Baus. The Respondents herein not represented on this Memorandum are Charles T. Bishop, Jr., and Brewer Adjustment Company.

defendants are senior corporate officers of Delta who are needed in Atlanta, and that a vast majority of the prospective witnesses live and work in the Atlanta area. Further, Judge Waddy reviewed the comparative court congestion in Atlanta and the District of Columbia and determined that Pfister's case could be more expeditiously concluded in the Atlanta forum. Judge Waddy also considered Pfister's two main arguments against transfer. In this regard, the Judge first observed that it would cost Pfister no more to try his case in Atlanta than in the District of Columbia because Delta had offered to reimburse him for any out-of-pocket additional expenses incurred because of an Atlanta-based trial. Second, in his response to Delta's motion to transfer venue, Pfister had alleged that he was so emotionally and physically ill that he could not travel; from this Judge Waddy properly concluded that Pfister could travel to the District of Columbia no better than to Atlanta. Accordingly, Judge Waddy determined that a transfer of the case to Atlanta was appropriate under 28 U.S.C. § 1404(a) for the convenience of parties and witnesses and in the interests of justice. Petitioner's Appendix 1, pp. 1-7 (hereinafter referred to as "Pet. App. ——, p. ——").

Pfister appealed that transfer order to the Court of Appeals for the District of Columbia. That appeal was dismissed on September 20, 1977 (Pet. App. 9, p. 15) on the ground that the order transferring venue was not an appealable order. On January 30, 1978, Pfister filed his present Petition for a Writ of Certiorari with this Court to review that dismissal.

Pfister also petitioned the District of Columbia Circuit for a writ of mandamus to reverse the dis-

trict court's transfer order on the grounds that Judge Waddy had abused his discretion in ordering a change of venue. That petition was dismissed by the court of appeals on August 2, 1977 (Pet. App. 3, p. 9). Pfister's subsequent request for a rehearing *en banc* was likewise denied on September 13, 1977 (Pet. App. 4, p. 10). On January 30, 1978, Pfister filed his present Petition for a Writ of Certiorari with this Court seeking review of the above appellate court order.[2]

Thus, in his combined Petition now pending before this Court Pfister urges this Court to review and reverse two appellate court determinations. First, Pfister asks this Court to rule that a district court order under 28 U.S.C. § 1404(a) transferring a case from one district court to another is an appealable order. Second, Pfister requests this Court to reverse the appellate court's order dismissing his petition for mandamus on the ground that Judge Waddy abused his discretion in ordering a transfer of this case to Atlanta.

For reasons summarized below, Delta submits that Pfister's combined Petition for a Writ of Certiorari herein should be denied in its entirety.

Reasons for Denying the Petition

1. *The Appeal.*—Pfister's appeal was dismissed by the court of appeals on September 20, 1977. Thus, his ninety days within which to file a petition for

[2] Pfister has filed a single Petition with this Court seeking reversal both of the appellate court's dismissal of his appeal and of its dismissal of his Petition for a Writ of Mandamus.

certiorari[3] expired on December 19, 1977.[4] The instant Petition to this Court, which was filed on January 30, 1978, is thus more than one month out of time and should be dismissed for lack of jurisdiction. *See Department of Banking* v. *Pink*, 317 U.S. 264 (1942).

Further, a transfer order by a district court is not an appealable order.[5] *E.g.*, *Pacific Car & Foundry* v. *Pence*, 403 F.2d 949 (9th Cir. 1968); *Wilkins* v. *Erickson*, 484 F.2d 969 (8th Cir. 1973). Pfister has advanced no arguments to support his request that this Court alter that clearly established doctrine.[6]

[3] 28 U.S.C. § 2101(c) (1949).

[4] The three stays of mandate granted by the court of appeals (Pet. Apps. 10, 11, 12, pp. 16, 17, 19) did not toll this 90-day period. *Title Guar. & Sur. Co.* v. *United States*, 222 U.S. 401 (1911). Nor did Pfister's attempt to consolidate his dismissed appeal with his dismissed mandamus petition, which was rejected by the court of appeals (Pet. App. 13, p. 19), toll the 90-day period, for that effort in no way affected the merits of Pfister's appeal nor sought to change the court of appeals' decision to dismiss. *Cf.*, *F.T.C.* v. *Minn.-Honeywell Reg. Co.*, 344 U.S. 206, 211 (1952).

[5] Pfister's motion for certification of the transfer decision for immediate appeal under 28 U.S.C. § 1292(b) was denied by Judge Waddy (Pet. App. 2, p. 8).

[6] Pfister urges this Court to determine that a district court order transferring a case is immediately appealable under the "collateral source rule" of *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1948). Petition, pp. 24-26. Significantly, Pfister cites no case supporting his position that the *Cohen* doctrine is applicable to transfer of venue orders. Pfister likewise points to no conflict among the various circuits with regard to the argument he advances. To the contrary, the circuits appear to agree that, absent extenuating

Indeed, this Court need not do so in order to protect Pfister or any plaintiff, for Delta has readily conceded throughout this litigation that Judge Waddy's order may be reviewed via a mandamus proceeding—but not an appeal—if Pfister can establish an abuse of discretion by Judge Waddy.

2. *The Mandamus Petition.*—Pfister's Petition for a Writ of Mandamus was dismissed by the court of appeals on August 2, 1977 and his subsequent request for a rehearing *en banc* was denied on September 13, 1977. Accordingly, Pfister's ninety days within which to file a petition for a writ of certiorari with respect to this order expired on December 12, 1977.[7] For this reason, Pfister's January 30, 1978 Peti-

circumstances not here present, orders transferring venue or refusing to transfer venue are interlocutory and not appealable under the "collateral source rule" articulated in *Cohen*. *See, e.g., Fischer* v. *First Nat'l Bank of Omaha,* 466 F.2d 511 (8th Cir. 1972); 9 *Moore's Federal Practice* ¶ 110.13[6] at 174. Indeed, the thrust of Pfister's contentions merely supports the conclusion that a petition for writ of mandamus—not an appeal—is the appropriate procedural vehicle for obtaining appellate court review of a district court transfer order. *See, e.g., Pacific Car & Foundry* v. *Pence, supra; Wiren* v. *Laws,* 194 F.2d 873 (D.C. Cir. 1951).

[7] The three stays of mandate granted by the court of appeals (Pet. Apps. 5, 8, 14, pp. 11, 14, 20) did not toll this 90-day period. *Title Guar. & Sur. Co.* v. *United States, supra* note 4. Nor did Pfister's attempt to consolidate his dismissed mandamus petition with his dismissed appeal toll the 90-day period. Pet. App. 8, p. 14. *Cf., F.T.C.* v. *Minn.-Honeywell Reg. Co., supra* note 4, at 211. Further, neither the court of appeals' *sua sponte* order of October 31, 1977 setting forth Judge Fahy's dissenting opinion (Pet. App. 6, p. 12) nor its December 29, 1977 order clarifying the October 31 order as nothing more than a reflection of Judge Waddy's dissent (Pet. App. 7,

tion, which is more than one and one-half months out of time, should be dismissed for lack of jurisdiction. *See Department of Banking* v. *Pink, supra.*

Moreover, notwithstanding the above, it is clear that the appellate court properly declined to grant Pfister's mandamus petition, as the district court did not abuse its discretion in ordering a transfer of venue.[8] Thus, the district court carefully weighed all

p. 13) tolled the 90-day period, for neither order changed any matters of substance, resolved any real ambiguity, or "disturbed or revised any legal rights and obligations . . . ." *F.T.C.* v. *Minn.-Honeywell Reg. Co., supra* note 4, at 211. Pfister's frivolous and futile attempt to introduce newly acquired evidence to the court of appeals after his mandamus petition had been dismissed (Pet. App. 8, p. 14) did not toll the 90-day period. For, like the above discussed motions, it sought no change in the substance of the court of appeals' order dismissing the mandamus petition. *Cf. F.T.C.* v. *Minn.-Honeywell Reg. Co., supra* note 4, at 211; *Department of Banking* v. *Pink, supra.*

[8] In substantial part, Pfister's Petition deals with the alleged merits of his lawsuit against Delta and is irrelevant to the question of whether or not this case should be tried in Washington, D.C. or Atlanta, Georgia. Moreover, to the extent Pfister's arguments concerning his ill health and lack of funds are relevant to the issue at hand, the district court clearly considered these factors and thus did not abuse its discretion by ordering a transfer of venue. Thus, for example, the district court properly noted Pfister's lack of funds and stated (at Pet. App. 1, p. 5 n.5):

> "This argument lacks much strength inasmuch as counsel for Delta, at the hearing on March 21, 1977, on the record, offered to reimburse plaintiff [Pfister] for any out-of-pocket additional travel expenses incurred by reason of having the case tried in Atlanta."

relevant factors and concluded that the convenience of the parties, the convenience of witnesses and the interests of justice would be best served by a transfer of the case from the District of Columbia to Atlanta, Georgia (Pet. App. 1, pp. 1-7). *See generally Loew's Inc.* v. *McGuire*, 205 F.2d 719 (D.C. Cir. 1953).

Pfister seems to contend, however, that because ERISA was enacted to protect employees like him, district courts may not transfer ERISA cases. Significantly, Pfister cites no legislative history or statutory language indicating that Congress intended to modify the provisions of 28 U.S.C. § 1404(a) by its enactment of ERISA. Accordingly, Pfister has given this Court no reason to deviate from the clear rule that all civil actions are subject to transfer under 28 U.S.C. § 1404(a) if the convenience of parties and witnesses and the interests of justice will be better served by such a transfer. *Ex Parte Collett*, 337 U.S. 55 (1949); *United States* v. *National City Lines, Inc.*, 337 U.S. 79 (1949); 1 *Moore's Federal Practice* ¶ 0.145[4.-1].

Pfister also seems to advance a "fall back" argument to the effect that ERISA creates a presumption in favor of a plaintiff's forum selection so that even if a district court may consider a transfer under 28 U.S.C. § 1404(a), it may order transfer only if it is

---

Further, as to Pfister's ill health, the district court stated (at Pet. App. 1, p. 5):

> "Moreover, if the plaintiff [Pfister] is as emotionally and physically permanently injured as it is alleged, the Court must assume that he would not be capable of appearing or giving testimony in any forum in any jurisdiction."

clear that the interests of justice and convenience of the parties and witnesses will be better served by a change of venue. Again this argument disregards the teachings of *Ex Parte Collett, supra.* Further, this argument merely restates Pfister's contention that Judge Waddy abused his discretion by transferring this case to Atlanta. However, as Delta has shown above, and as a reading of the district court's decision makes clear, there has been no abuse of discretion.

Thus, despite Pfister's protracted lament, he clearly has forfeited no substantive rights by the transfer of his case to Atlanta. He may continue to pursue fully his claims, for none have been dismissed. The appellate and district courts have done no more than tell Pfister that ERISA plaintiffs may not engage in unseemly forum shopping and that the convenience of witnesses and parties, as well as the interests of justice, will be better served if he, a Pennsylvania resident, who worked in Virginia and has sued over twenty defendants residing in and around Atlanta, proceeds with his case in Atlanta rather than in the District of Columbia. Notwithstanding Pfister's contentions to the contrary, no extraordinary precedent injurious to future ERISA plaintiffs has been established by the decisions below. Nor does this case present any new principle of law worthy of review by this Court.

Conclusion

Pfister's Petition for a Writ of Certiorari has been untimely filed and is substantively unworthy of review. Accordingly, it should be denied.

Respectfully submitted,

PETER G. NASH, ESQ.
GEORGE J. PANTOS, ESQ.
ANNE E. MATTHEWS, ESQ.
VEDDER, PRICE, KAUFMAN,
KAMMHOLZ & DAY
1750 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 393-5970

Counsel for Respondents, Delta Air Lines, Inc., et al.

Dated: February 28, 1978